No. 18-96

In The Supreme Court of the United States

TENNESSEE WINE AND
SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TENNESSEE FINE WINES AND SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE

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RULE 29.6 STATEMENT

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More has no parent corporation, and no publicly held company owns any shares in Respondent.

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BRIEF IN OPPOSITION

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine"), respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by the Tennessee Wine and Spirits Retailers Association ("Tennessee Retailers"). This case is not an appropriate vehicle to clarify whether *Granholm* v. *Heald*, 544 U.S. 460 (2005), carved out an exception to normal Dormant Commerce Clause principles that would allow States to enact blatantly discriminatory laws to protect local retailers from out-of-state competition, under the guise of regulating the sale of alcoholic beverages within the State.

The Tennessee statute at issue here flatly forbids citizens of other states from obtaining a license to operate a retail liquor store (a package goods store offering alcoholic beverages for off-premises consumption) unless they have established residency in Tennessee and continue to maintain it *for at least nine years*. The statute also prohibits corporations and other business entities from obtaining a retail liquor license unless *every director, officer and shareholder of the business* has been a Tennessee resident for at least nine years. If this statute had been upheld, Total Wine, whose owners reside in Maryland, would have been ineligible for a retail liquor license. The statute would also render ineligible for a retail license any publicly traded corporation and many other larger out-of-state businesses. The Attorney General of Tennessee twice opined that this residency statute violated the Dormant Commerce Clause and could not be enforced.

See Opp. App. at 1a-18a. Thereafter, out-of-state residents, including two of the named respondents, began to apply for and obtain liquor licenses in Tennessee. When the Tennessee Retailers threatened to sue the State's Alcoholic Beverage Commission ("Commission") if Total Wine were granted a retail license, the Attorney General filed this declaratory judgment action in a Tennessee chancery court to determine if the statute was in fact unenforceable. After removal of the case to the United States District Court for the Middle District of Tennessee (upon petition of the Tennessee Retailers), Judge Sharp concluded—in a thorough opinion—that the statute blatantly discriminated against out-of-state residents, while noting that neither the Commission, nor the Tennessee Retailers, had offered any evidence of a legitimate non-protectionist purpose advanced by the residency requirements. *See* Pet. App. at 78a-80a.

The Court of Appeals affirmed the District Court's ruling in another thorough opinion. Pet. App. 2a-39a. Even dissenting Judge Sutton (who concurred in portions of the majority opinion) determined that certain aspects of the statute did not further any legitimate state interest, *id.* at 54a, while other aspects constituted "the epitome of arbitrariness." *Id.* at 55a. It is little wonder that the State of Tennessee, through its Attorney General and the Director of the Commission, *did not appeal* the ruling of the District Court declaring the statute unconstitutional and enjoining its enforcement, and declined to participate in oral argument in the Sixth Circuit. Moreover, the State never

sought a stay of enforcement of the District Court's injunction, and the Commission has now granted liquor licenses to both respondents. Both of these "out-of-state" licensees are currently operating retail liquor stores in Tennessee.[1]

As set forth below, this case is a far cry from the "clean vehicle" posited by the Tennessee Retailers for this Court to provide guidance on the proper application of *Granholm* to state durational residency requirements for obtaining licenses for the wholesale and retail sale of alcohol. In addition, Judge Moore, who authored the Court of Appeals' majority opinion, clearly got it right. The bizarre durational residency requirements enacted by Tennessee are blatantly protectionist, have no legitimate regulatory purpose, and cannot be squared with decades of this Court's Commerce Clause jurisprudence, including the Court's decision in *Granholm*.

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[1] Respondent Total Wine opened its 30,000 square foot store in Knoxville on June 27, 2018. It is the largest retail establishment of its kind in the State and it offers the widest selection of beers, wines, and spirits, at competitive prices not previously seen in Tennessee. *See* https://www.knoxnews.com/story/money/business/2018/06/28/total-wine-party-new-turkey-creek-store/741997002/. All of the store's employees, including its general manager, are Tennessee residents. Respondent Affluere Investments, Inc. ("Affluere") acquired an existing liquor store in Memphis, Tennessee in the summer of 2017. Affluere's stockholders, directors, and executive officers are now and have been residents of the State of Tennessee since June, 2016.

STATEMENT OF THE CASE

A. A Fair and More Complete Analysis of the Statutory Scheme.

The Tennessee Retailers focus their Petition only on certain aspects of the durational residency statute in question, without acknowledging how the statute was designed to prevent any out-of-state residents or any business with out-of-state owners from obtaining a liquor license in Tennessee. For example, Petitioner notes that "Tennessee law provides that, to obtain a retail license, an individual must have 'been a bona fide resident of Tennessee during the two year period immediately preceding the date upon which application is made.'" Pet. at 8 (quoting Tenn. Code Ann. §57-3-204(b)(2)(A)). But Petitioner all but ignores the very next clause, which provides that a retail liquor license, once granted, cannot be renewed unless the applicant has been a Tennessee resident "for at least ten (10) consecutive years." Tenn. Code Ann. §57-3-204(b)(2)(A). Given that liquor licenses in Tennessee are only valid for one year after issuance, Tenn. Code Ann. §57-3-213(a), the renewal requirement effectively imposes a *nine year* durational residency requirement on individuals seeking to own and operate a Tennessee package store. As a practical matter, no person who had resided in Tennessee for less than nine years would spend the funds necessary to obtain a license, and build and stock a liquor store, in the face of these license renewal requirements. It was this aspect of the statute that Judge Sutton (whose separate opinion is otherwise touted by Petitioner as having adopted the correct deferential

approach) described as "the epitome of arbitrariness." Pet. App. at 55a.

Petitioner glosses over another aspect of the statute that Judge Sutton and the Court of Appeals' majority agreed was in plain violation of the Dormant Commerce Clause. For business entities, including Tennessee limited liability companies like Total Wine, no license can be granted or renewed "if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible" under the nine year durational residency requirements for individual licensees. *See* Tenn. Code Ann. §57-3-204(b)(3)(A). Thus, no corporate entity can obtain a Tennessee liquor license unless *every* officer, *every* director, and *every* shareholder can establish Tennessee residency for nine years prior to the date of application. The effective and intended result of this provision is to preclude outside business interests, including large specialty stores like Total Wine, from obtaining a Tennessee liquor license and competing with the Tennessee Retailers. Judge Sutton noted that he saw "no way to explain this all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism." Pet. App. at 54a. And the majority opinion correctly observed in response to Judge Sutton's attempt to sever and uphold only certain clauses of the residency statute that the State had offered no evidence during the District Court proceedings to prove (or even suggest) that any aspect of Tennessee's durational residency requirements actually served a purpose other than economic protectionism. *Id.* at 37a-38a & n.11.

Finally, Petitioner ignores certain other incongruous aspects of the Tennessee statute. For example, the durational residency requirements for retail licensees were initially enacted in 1984, *see* Opp. App. at 9a, but the legislative statement of intent with respect to those provisions was not enacted until 2014, only after the State's Attorney General had opined that the requirements could not be enforced under the Commerce Clause as interpreted by the Court of Appeals' opinion in *Jelovsek* v. *Bredesen*, 545 F.3d 431 (6th Cir. 2008) (discussed below). *See* Opp. App. at 14a-16a. And while the Tennessee legislature belatedly attempted to justify the durational residency requirements on a need to maintain a "higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises," Tenn. Code Ann. §57-3-204(b)(4), those requirements never have been applied to retail licensees who sell spirits, wine and beer for on-premises consumption in bars and restaurants. *See* Tenn. Code Ann. §57-4-201. Petitioner argues that these requirements are deserving of deference because they serve important community interests tied to the local consequences of excessive alcohol consumption, such as drunk driving, thereby warranting that local retailers should be fully invested in those communities. Pet. at 31. Yet there is no explanation for the fact that Tennessee has never required that all (or any) of the owners, officers and directors of national hotel and restaurant chains should be required to establish residency in Tennessee before they obtain retail licenses to serve alcohol for on-premises consumption. The durational

residency requirements at issue here were enacted in 1984 to protect established local package stores against competition from out-of-state businesses seeking to enter the Tennessee market.

B. The Unusual Procedural Aspects of This Case.

Petitioner begins its discussion of the procedural history of this case in 2016, when Total Wine and respondent Affluere Investments, Inc. applied for Tennessee retail liquor licenses. Pet. at 9. Petitioner omits prior events showing why the applicants reasonably expected to receive a license notwithstanding the durational residency requirements imposed by the statute. Eight years earlier, in *Jelovsek* v. *Bredesen*, *supra*, the Court of Appeals held that nearly identical durational residency requirements for the issuance of a Tennessee winery license were discriminatory on their face and impermissibly favored the interests of Tennessee wineries "at the expense of interstate commerce." 545 F.3d at 438.

After the decision in *Jelovsek*, and upon request of a member of the state legislature, the Attorney General of Tennessee opined in 2012 that the Tennessee residency requirements for applicants seeking a license as an alcoholic beverage retailer or wholesaler also violated the Commerce Clause and could not be enforced. Among other reasons, the Attorney General examined the legislative history of the statutes and determined that it "reveals no legitimate public policy to

support these residency requirements and indeed provides some evidence that the legislative intent for the residency requirements for retailers was to deter the sale of alcoholic beverages from outside Tennessee, which intent would violate the federal Commerce Clause." Opp. App. at 11a.[2] Undeterred, the lobbyists for the Tennessee Retailers returned to the legislature seeking relief.

In 2014, the Tennessee General Assembly amended the licensing statute and removed the residency requirements for certain classes of retail licensees, but retained the durational residency requirements for retail licensees seeking to sell spirits and high alcohol content beer for off-premises consumption. At the same time, the General Assembly, without any legislative fact-finding, enacted a new statement of purpose in Tenn. Code Ann. §57-3-204(b)(4). New subsection (b)(4) stated that it was in the interest of the state "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises" selling products containing higher alcohol content than persons seeking licenses to sell only wine and beer, who were not subjected to the residency requirements. According to the General Assembly, that state interest could only be satisfied if Tennessee required "all licensees to be residents of this state as provided

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[2] For example, the Attorney General pointed to floor debates in which a member of the Tennessee House noted that they had just voted "to kill interstate banking. I think all this does is kill interstate whiskey." Opp. App. at 9a.

herein. . . ." The General Assembly offered no other reasons supporting the two-year and ten-year durational residency requirements for an initial application and license renewal, nor any reason why the asserted local interests in ensuring responsible sales of spirits could not be satisfied, for example, by a requirement that a corporate licensee designate a resident manager or agent, post a bond to ensure compliance with all local laws, and/or file regular compliance reports with the Commission. Nor did the General Assembly explain why its concerns for local accountability did not apply to the owners of bars and restaurants.

The Attorney General of Tennessee was asked again, this time by a state senator, whether the amended statute violated the Commerce Clause. Relying principally on this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), the Attorney General readily concluded in 2014 that the residency requirements facially discriminated against nonresidents, and that the statement of legislative intent in subsection (b)(4) did not establish a local purpose sufficient to justify the discriminatory licensing provisions. Opp. App. at 13a. The Attorney General reasoned that the State had not carried its burden of showing that its need for "greater oversight with alcohol-related licenses can be served only by favoring residents over nonresidents." *Id.* at 16a. The Attorney General also observed that the State's asserted interests in ensuring the "health, safety, and welfare" of local communities could readily be achieved by less discriminatory means, including

various forms of electronic monitoring. *Id.* at 17a-18a (citing *Granholm*, 544 U.S. at 492-93).

After the Attorney General's second opinion, the Commission continued to accept retail license applications from out-of-state residents, and from businesses that did not meet the requirement that all officers, directors, and shareholders needed to establish and maintain residency in Tennessee. Total Wine was formed as a Tennessee limited liability company in November, 2015 and on July 5, 2016, applied for a license for a new package store to be located in Nashville. Pet. App. 58a. The members of Total Wine are not Tennessee residents, *id.*, but in its application Total Wine designated a general manager who planned to relocate and become a resident of Tennessee. And, of course, all of the store's prospective employees would be Tennessee residents. The staff of the Commission recommended that the license be approved and the Commission was scheduled to vote on the application on August 23, 2016. Another application from respondent Affluere (whose owners recently had moved to Tennessee but who did not meet the two-year and ten-year durational residency requirements) was also scheduled to be voted on at that meeting. The Commission, however, postponed and later deferred action on the scheduled vote on the respondents' applications pending the outcome of this action. On September 21, 2016, Respondent Clayton Byrd, the Executive Director of the Commission, represented by the State's Attorney General (a successor to the Attorney General who had twice opined that the residency requirements violated

the Commerce Clause) filed a declaratory judgment action in the Chancery Court for Davidson County, Tennessee seeking a ruling on the constitutionality of the durational residency provisions as applied to applicants for off-premises retail liquor licenses. Pet. App. at 4a.

Total Wine, Affluere, and the Tennessee Retailers (who had threatened to sue the Commission if Total Wine were granted a license) were named as defendants in the Chancery Court action. The Tennessee Retailers removed the action to the District Court on federal question grounds, and Judge Sharp entered an order realigning Total Wine and Affluere as plaintiffs (along with Respondent Byrd), leaving the Tennessee Retailers as the sole defendant. *Id.* at 4a n.1. But when Total Wine moved for summary judgment with respect to the constitutionality of the residency requirements, the State and the Tennessee Retailers each filed opposition memoranda supporting the statute's constitutionality. *Id.*

In granting Total Wine's motion, the District Court readily found that the statutory provisions discriminated against interstate commerce because they created a barrier to entry, precluding out-of-state residents and business owners from seeking to enter the Tennessee retail liquor market. Pet. App. at 73a-74a. The Court also concluded that the residency requirements did not advance a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory means. *Id.* at 76a-77a. The Court noted that Respondent Byrd had not offered "any concrete

evidence to show that the discrimination against out-of-state residents is demonstrably justified," relying instead on an argument that Tennessee's residency requirements were not subject to a Commerce Clause challenge at all because of the State's grant of regulatory control over the retail sale and distribution of alcoholic beverages under the Twenty-first Amendment. *Id.* at 78a. After reviewing the statement of legislative purpose in §204(b)(4) of the statute, the District Court concluded that it "fails to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises." *Id.* at 80a. Because the State and the Tennessee Retailers had made "no showing that the residency requirements advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, the Court finds that the residency requirements do not survive a Commerce Clause challenge." *Id.*[3] The District Court declared the residency requirements unconstitutional and enjoined their enforcement. *Id.* at 81a.

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[3] The District Court's ruling on Commerce Clause grounds precluded the need for the Court to rule on Total Wine's alternative argument that the Tennessee residency statutes also violated the rights of Total Wine's owners under the Privileges and Immunities Clause of the Constitution. Although the Privileges and Immunities claim was briefed below, the Court of Appeals also did not rule on that issue. As addressed herein, this is one of several reasons why this case is not an appropriate vehicle for the Court to resolve the question that Petitioner seeks to present.

Petitioner Tennessee Retailers filed a timely notice of appeal from the District Court's judgment; the Attorney General, representing Respondent Byrd and the interests of the State, did not. The Attorney General did file a brief in the Court of Appeals generally supporting the statute, but the State waived oral argument. Significantly, neither the Tennessee Retailers nor the State ever sought a stay of enforcement of the District Court's order enjoining Respondent Byrd from applying the residency requirements. As a result, by the time this case was argued in the Court of Appeals, Affluere already had obtained its liquor license. Total Wine lost its opportunity to obtain a license in Nashville when it was unable to execute the lease on its desired premises due to the pendency of this litigation. But after the Court of Appeals issued its ruling, Total Wine applied for and obtained a retail license for a new package store in Knoxville. That 30,000 square foot store opened for business on June 27, 2018. *See* note 1 *supra*.

Total Wine believes there are several other retail stores licensed by the Commission and currently open for business in Tennessee that do not satisfy the durational residency requirements at issue in this litigation.[4] Those licenses were granted by the

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[4] During the proceedings in the District Court, Total Wine sought discovery from the State through a public information request about the existence of other Tennessee retailers who do not meet the residency requirements imposed by the statute. The Commission responded that it did not keep track of the residency of applicants for retail licenses once the Attorney General had declared the statute unenforceable. *See* R.96 (Page ID#611-18)

Commission following the opinions of the Attorney General described above, and before Respondent Byrd filed this declaratory judgment action based on the threat of litigation from the Tennessee Retailers.

REASONS FOR DENYING THE PETITION

The opinions of the District Court and the Court of Appeals majority demonstrate thoroughly that the essential premises of the Petition are flat wrong. First, contrary to language in the opinion of the Court of Appeals in *Southern Wine & Spirits of America, Inc.* v. *Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), and the separate opinion of Judge Sutton in this case (dissenting with respect to certain aspects of the Tennessee durational residency requirements), this Court's decision in *Granholm* did not grant the States *carte blanche* to enact and enforce anticompetitive legislation that would shield local liquor wholesalers and retailers against competition from out-of-state businesses that sought to establish locations in those States. Second, no decision from this Court is needed to resolve a conflict among the Circuits because no reviewing court would conclude that the Tennessee statute at issue here serves any purpose

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(declaration of counsel and attached letter from Commission confirming that after the 2012 Attorney General's opinion the Commission did not consider the Tennessee residency requirements in acting upon applications for retail licenses nor maintain records concerning out-of-state residents who had obtained licenses).

other than an impermissible purpose to protect local businesses from out-of-state competition.

As the Court of Appeals majority correctly concluded, *Granholm* in fact makes clear that the nondiscrimination principle of the Commerce Clause applies to *all* aspects of the sale and distribution of alcoholic beverages, and is not limited, as Petitioner contends, to discrimination against out-of-state products. *See* Pet. App. at 16a-23a. And even though the "three tier system" of alcohol distribution imposed by most States has been held to be "unquestionably legitimate," *Granholm*, 544 U.S. at 489, that does not mean those States are free to structure their three tier systems solely to protect local business interests, and to discriminate against nonresidents seeking to compete within the State through the imposition of onerous durational residency requirements that serve no legitimate purpose. As Justice Scalia observed in a concurring opinion in *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 344 (1989), when a State exercises its regulatory power over the sale of alcoholic beverages in a fashion that discriminates against out-of-state interests, "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded [to the State] by the Twenty-first Amendment." The Court in *Granholm* quoted Justice Scalia's observation with approval, 544 U.S. at 488. (In an otherwise thorough collection of relevant precedents, Petitioner fails to mention *Healy*.)

In *Granholm*, this Court also reaffirmed throughout its opinion that the Commerce Clause does not simply prohibit protectionist discrimination against

out-of-state products and producers, but rather prevents the States from depriving "citizens of their right to have access to the markets of other States on equal terms." *Id.* at 473. In fact, the *Granholm* Court reiterated that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.'" *Id.* at 487 (quoting *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

Total Wine's owners are residents of Maryland, who formed a Tennessee limited liability company with the purpose of gaining access to the retail market for the off-premises sale of alcoholic beverages in that State on equal terms with residents of Tennessee. In purporting to deny Total Wine a liquor license on the sole basis that its owners are not residents of Tennessee, the State's durational residency statute favors in-state economic interests over out-of-state interests, and the courts below were correct to strike it down.

But aside from the fact that this case was correctly decided below, there are ample additional reasons for this Court to deny the Petition.

I. There Is No Real Conflict Among the Circuits.

No federal appellate court has reviewed a durational residency requirement for a liquor license that is at all similar to the Tennessee statute at issue here

and determined that, despite its discriminatory effect on nonresidents, it was immunized from Commerce Clause scrutiny by the Twenty-first Amendment or validated by legitimate state purposes that could not otherwise be adequately served. That is because no state has enacted residency requirements for wholesale and retail liquor licenses that are as blatantly discriminatory as the Tennessee provisions at issue here. Indeed, Judge Sutton in his separate opinion recognized that the requirement that a corporation could not be approved for a retail license unless 100% of its shareholders were Tennessee residents could not be explained as based on anything other than the promotion of unlawful economic protectionism of the sort that the Commerce Clause was designed to prevent. Pet. App. at 54a. And the requirement that no license can be renewed unless the license holder and all of its principals have maintained Tennessee residences for ten consecutive years was acknowledged by Judge Sutton to represent "the epitome of arbitrariness." *Id.* at 55a.

Petitioner argues that the decision below, and multiple decisions of the Court of Appeals for the Fifth Circuit, culminating in *Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n* v. *Fine Wine & Spirits of North Texas, L.L.C.*, ___ U.S. ___ (2016) (Docket No. 16-242), are in irreconcilable conflict with the decision of the Eighth Circuit in *Southern Wine & Spirits, supra*. But the decision in *Southern Wine* is distinguishable both factually and doctrinally. In that case, the Court of Appeals upheld a Missouri statute

that imposed a three year residency requirement for corporations seeking to obtain a wholesaler's license in that State. Missouri defended the statute, which applied to the corporation's officers, directors, and at least 60% of its shareholders, based on the State's asserted interest in public accountability. The Court found that the discrimination against nonresident corporations inherent in these requirements would be impermissible under the Commerce Clause, unless authorized by the Twenty-first Amendment. 731 F.3d at 807. But notably, the Court also observed that Southern Wine had waived in the district court any argument that the legislation was motivated *solely* by economic protectionism—implying that if that were the statute's only purpose the residency requirements would be invalid, even if they were integral to Missouri's three-tier system of alcohol distribution. *Id.* at 807-08. Finally, the Court interpreted language in *Granholm*, and specifically the sentence reaffirming that "the three-tier system itself is 'unquestionably legitimate,'" 544 U.S. at 489, as mandating some deference for the states in structuring the wholesale and retail tiers, so long as they did not discriminate against out-of-state producers of beer, wine, and spirits. Based on that reasoning, the Court determined that Missouri had "established a sufficient basis for its residency requirement, which is meaningfully tied to the 'aim of the Twenty-first Amendment . . . to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.'" 731 F.3d at 812 (quoting *Granholm*, 544 U.S. at 484).

The decision of the Eighth Circuit in *Southern Wine* clearly turned on the Court's acceptance of the State's proffered nondiscriminatory purposes for its wholesaler residency requirements, and the plaintiff's failure to demonstrate that the sole purpose of the Missouri statute was protectionist. Here, by contrast, both the District Court and the Court of Appeals determined that the Tennessee durational residency requirements were blatantly discriminatory and protectionist, both in purpose and effect. And the Sixth Circuit majority found, based on the record presented in the District Court, that "neither [Respondent] Byrd nor [Petitioner] argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's [stated] goals." Pet. App. at 33a. For these reasons, it is not at all clear that this case would have turned out differently if it had been decided in the Eighth Circuit.

Moreover, it is perfectly clear that the decisions of the Courts of Appeals for the Second and Fourth Circuits, relied upon by Petitioner as evidence that the Circuits are "intractably divided," Pet. at 23, are not in conflict with the decision below. As Petitioner concedes, *id.*, those decisions did not involve durational residency requirements for the owners of local liquor licenses. The Second and Fourth Circuit decisions both involved challenges to laws that required alcohol to be sold to local consumers by in-state licensed retailers who had established a physical presence in the state consistent with the three-tier system created by those states. Total Wine today is selling alcohol in Tennessee

from its retail package store in Knoxville as a licensed in-state retailer.

In *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185 (2d Cir. 2009), an Indiana retailer sought the ability to sell directly to New York consumers without first obtaining a New York retail license or opening a local store. The requirement that any retailer had to obtain a license, and establish a physical presence in the state, was inherent in New York's three-tier system of licensed distribution of alcoholic beverages. The Second Circuit's observation that the plaintiff's Commerce Clause challenge presented "a frontal attack on the constitutionality of the three-tier system itself," 571 F.3d at 190, and was thereby inconsistent with *Granholm*, was made in that narrow context.

In *Brooks* v. *Vassar*, 462 F.3d 341 (4th Cir. 2006), the Court reviewed a number of Commerce Clause challenges to Virginia's liquor laws. The plaintiffs argued, among other claims, that a Virginia statute that allowed consumers to bring into the State for consumption only limited amounts of wine purchased from out-of-state wineries impermissibly favored in-state licensed retailers who could sell unlimited amounts of wine to those same consumers. *Id.* at 352. It was in this context that Judge Niemeyer, speaking only for himself,[5] observed that "an argument that

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[5] The aspect of *Brooks* relied upon by Petitioner to support the asserted conflict was not contained in an opinion for the Court. District Judge Goodwin dissented and would have affirmed the District Court's conclusion in *Brooks* that Virginia's so-called "Personal Import Exception" violated the Commerce

compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." Judge Niemeyer opined that any such argument was precluded by *Granholm*. *Id.*

Neither the Second Circuit's holding in *Arnold's Wines*, nor Judge Niemeyer's opinion in *Brooks*, has anything to do with the constitutionality of durational residency requirements that prevent otherwise qualified nonresidents from becoming in-state licensees. These decisions do not demonstrate a conflict in the Circuits on the question presented by this Petition. Moreover, as will be shown below, protectionist residency requirements have in fact been disfavored by a long line of federal decisions, following this Court's Commerce Clause precedents, including the decision in *Granholm*.

II. Petitioner Overstates the National Significance of This Case.

Petitioner contends that as many as 21 states impose some form of durational residency requirements on alcohol retailers or wholesalers, and that many more state laws impose other residency-related

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Clause. *See* 462 F.3d at 361-63. Judge Traxler concurred in the Court's opinion, except for the portion relied upon by Petitioner, as to which he concurred in the judgment without further explanation. *Id.* at 361.

restrictions on the distribution and sale of alcohol. Pet. at 23-25 & n.3 (collecting statutory citations). Affiliates of Total Wine are currently operating licensed retail package stores in several of those states, including Kentucky, Missouri, New York, South Carolina, Virginia, and Washington, despite the fact that the owners of those licensees do not reside in the states in question.[6] Many "three-tier system" states impose no residency requirements on wholesale or retail licensees. In other states, national retailers are able to obtain licenses because many of the statutes cited by Petitioner allow corporations and other business entities to establish and maintain "resident status" if they are registered or qualified to do business in the state, *e.g.*, Ky. Rev. Stat. Ann. §243.100; La. Stat. Ann. §26:80; Me. Rev. Stat. tit. 28-A, §1401; Wash. Rev. Code Ann. §66.24.010, or they have designated a local manager or single officer or director who becomes the resident agent of the licensee, *e.g.*, Mo. Rev. Stat. §311.060; N.H. Rev. Stat. Ann. §178:1 (applicable solely to manufacturers and distributors); Wis. Stat. Ann. §125.04. These

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[6] Total Wine currently has licensed stores in 23 states that permit private retail sales of alcoholic beverages. The local licensees are typically organized as corporations or limited liability companies. The principal owners of these licensees reside in only one of those states, Maryland. All of the states in which Total Wine does business have implemented some form of the three-tier system for the distribution of alcoholic beverages. Many do not require that a locally registered corporate or business licensee establish some other form of state "residence." Many others, by statute, regulation, or administrative practice, allow entity licensees to designate a local manager as their resident agents for regulatory purposes.

statutes offer clear proof that a durational residency requirement for all officers, directors, and shareholders of a corporate licensee is not an essential element of the three-tier system of distribution. And none of the statutes cited by Petitioner imposes an effective nine year durational residency requirement on applicants for wholesale or retail licenses. The Court of Appeals majority correctly found that the Tennessee statute is blatantly protectionist and serves no legitimate local purpose that could not be readily served by other non-discriminatory licensing requirements. *See* Pet. App. at 32a-33a (describing such alternatives).

In several other states, restrictive residency requirements (including some of those cited by the Petitioner) have been struck down by reviewing courts as inconsistent with the Dormant Commerce Clause, notwithstanding the same Twenty-first Amendment arguments presented by Petitioner here. *See, e.g.*, *Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), discussed *supra* (Texas durational residency requirements are invalid under *Granholm*); *Anheuser-Busch, Inc.* v. *Schnorf*, 738 F. Supp. 2d 793 (N.D. Ill. 2010) (Illinois statutes denying distribution rights to out-of-state breweries are invalid under *Granholm*); *Peoples Super Liquor Stores, Inc.* v. *Jenkins*, 432 F. Supp. 2d 200, 221 (D. Mass. 2006) (opining in a challenge to Massachusetts residency requirements that "*Granholm* cannot be held to sanction protectionist policies at any of the [three] tiers"); *Glazer's Wholesale Drug Co., Inc.* v. *Kansas*, 145 F. Supp. 2d 1234, 1246 (D. Kan. 2001) (discriminatory durational residency

requirements have "nothing to do with" a state's interest in ensuring regulatory compliance).

Like the Court of Appeals in this case, those courts had little difficulty in reconciling *Granholm*'s reaffirmation of the essential nondiscrimination principles of the Dormant Commerce Clause with the "unquestioned legitimacy" of the three-tier system of alcohol distribution. Those decisions also belie any "intractable conflict" about the meaning of *Granholm*.

III. The State of Tennessee Is Not the Petitioner Here And Has Not Seen Fit to Defend the Constitutionality of the Durational Residency Requirements in a Consistent Fashion.

Respondent Byrd did not appeal the judgment of the District Court, and the Attorney General waived the State's opportunity to present oral argument in the Court of Appeals in support of the constitutionality of the durational residency requirements. Last week, the Attorney General waived a response to this Petition on behalf of Respondent Byrd. Throughout the course of these proceedings, the Attorney General of the State has vacillated over the validity of the durational residency requirements, opining twice in formal opinions that the legislation was invalid under the Commerce Clause. *See* Opp. App. at 1a-18a. When a successor Attorney General initiated the declaratory judgment action that began this litigation, the State's position on the validity of the statute was so unclear that, following removal of the Chancery Court complaint, the

District Court aligned Respondent Byrd as among the plaintiffs challenging the statute. *See* Pet. App. at 4a n.1. And although the Attorney General filed briefs in the courts below defending the statute, Respondent Byrd never offered evidence to suggest, let alone demonstrate, that any aspect of Tennessee's durational residency requirements actually served a purpose other than economic protectionism. *See* Pet. App. at 76a-80a (District Court findings); 32a-33a (decision of the Court of Appeals).

This Court should decline Petitioner's invitation to rewrite decades of Commerce Clause and Twenty-first Amendment jurisprudence where the authorized officials of the State have not defended the statute at issue in a consistent fashion nor offered a coherent rationale for why the statute can be justified despite its discriminatory effect on nonresidents. The Petition here is presented by the Tennessee Retailers, a private trade association and lobbying organization whose members are motivated by their own business interests in preserving a local enclave free from competition from nonresidents like the owners of Total Wine, who have extensive experience operating efficient retail stores. The Tennessee Retailers no doubt lobbied for the challenged legislation, but they do not speak for the State of Tennessee.

Under somewhat similar circumstances, in *Hollingsworth* v. *Perry*, 570 U.S. 693, 715 (2013), this Court observed: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to.

We decline to do so for the first time here." In this case, the Attorney General of Tennessee twice opined that the statute was unconstitutional, in reliance upon this Court's decision in *Granholm*, and Respondent Byrd only initiated this litigation when threatened with a lawsuit from Petitioner. And after the District Court enjoined continuing enforcement of the statutes in question, the relevant state officials did not seek a stay. Instead, once the District Court ruled, and even before the Court of Appeals affirmed that decision, Respondent Byrd and the Commission began to accept applications and issue licenses to nonresident parties such as Total Wine and Affluere, so long as they satisfied all the reasonable requirements imposed by the State for the grant of a retail liquor license. Those nonresidents who have obtained licenses have now opened for business at considerable expense and they expect to have the ability to renew those licenses without regard to the ten year residency requirement imposed by Tenn. Code Ann. §57-3-204(b)(2)(A).

The principles underlying the decision in *Hollingsworth* are applicable here. This Court has previously noted that "the power to create and enforce a legal code . . . is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has . . . [a] direct stake . . . in defending the standards embodied in that code." *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986) (internal citations omitted). Given Respondent Byrd's waiver of the opportunity to respond to the Petition, it cannot be gainsaid that the Attorney General's defense of the statute in question has been inconsistent, ambivalent,

and at most lukewarm. This Court should reserve its grant of plenary review to a case in which the legitimacy of durational residency requirements for obtaining a state liquor license has been defended vigorously by the authorized proponents of the challenged legislation.[7]

IV. Resolution of the Question Presented Will Not Finally Determine the Outcome of This Controversy.

As noted above, Total Wine moved in the District Court for a ruling that the Tennessee durational residency requirements violated both the Dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the Constitution. *See, e.g.*, *Wilson* v. *McBeath*, 1991 WL 540043 (W.D. Tex. 1991) (enjoining enforcement of the Texas durational residency

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[7] Two years ago this Court was presented with a similar challenge to a decision of the Court of Appeals for the Fifth Circuit rejecting efforts by the Texas Package Stores Association to overturn a longstanding injunction against the enforcement of a durational residency requirement for the issuance of retail liquor licenses in Texas. As in this case, the Texas retailers' association argued that the decision in *Granholm* authorized the otherwise discriminatory statute. The State of Texas—the party that had been enjoined in 1991 from enforcing the discriminatory statute—remained on the sidelines and took no role in the Texas retailers' efforts to undo the ongoing effect of the injunction, and revive the durational residency requirement. This Court denied the petition for certiorari. *See Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016), *cert. denied sub nom. Texas Package Stores Ass'n* v. *Fine Wine & Spirits of North Texas, L.L.C.*, ___U.S. ___ (2016) (Docket No. 16-242).

requirements for obtaining a retail mixed beverage permit because they violated both the Commerce Clause and the Privileges and Immunities Clause). The District Court declined to reach the issue, Pet. App. at 80a-81a, and the Court of Appeals did not address it.

But Total Wine did brief this issue in the Court of Appeals, contending that the durational residency requirements deprived the individual owners of Total Wine of any opportunity to engage in a lawful business in Tennessee "on terms of substantial equality with the citizens of that State," a right that this Court has held to be protected by the Privileges and Immunities Clause. *See Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 280 (1985) (holding that a state's court rules limiting bar admission to state residents violated Privileges and Immunities because such clear discrimination against nonresident lawyers was not substantially related to legitimate state purposes that could not be adequately served by less restrictive means).

Petitioner argued below that the Privileges and Immunities Clause does not apply to corporations and should not be held applicable to the State's exercise of its police powers over liquor licenses. Those arguments were not well-founded for at least three reasons: 1) Total Wine was named as a defendant in this declaratory judgment action but was effectively asserting the individual rights of its owners who were deprived of the opportunity to obtain a license for their company based solely on the fact that they were not Tennessee residents; 2) this Court has never ruled that the Privileges

and Immunities Clause does not apply to members of limited liability companies; and 3) there has never been a decision from this Court holding that the Privileges and Immunities Clause is overridden by the Twenty-first Amendment, and nothing in *Granholm* suggests that state regulation of the liquor business is immune from scrutiny under Article IV, §2 of the Constitution.

In the unlikely event that this Court were to grant this Petition and reverse the decision of the Court of Appeals, a remand would be required in order for the courts below to address the Privileges and Immunities arguments implicated by Respondent Byrd's declaratory judgment action, and Total Wine's claim that the durational residency requirements violate the "privileges and immunities" of nonresidents who are deprived of the opportunity to apply for a retail liquor license on equal footing with citizens of Tennessee.

V. In Rejecting Petitioner's Strained Reading of *Granholm*, the Sixth Circuit Clearly Reached the Correct Result.

The linchpin of the position advanced by the Tennessee Retailers in this case, like the position of the Texas Package Stores Association in *Cooper*, *see* note 7 *supra*, is the erroneous assertion that this Court's decision in *Granholm* should be interpreted "to mean that the dormant Commerce Clause applies only to state laws that regulate alcohol *producers* or *products*." *See* Pet. at 12. The apparent source of this argument is the *Granholm* Court's reference to discrimination

against out-of-state producers when it invalidated state laws that prevented out-of-state wineries but not in-state wineries from engaging in direct shipments, and on the Court's passing observation that the three-tier system previously had been recognized as "unquestionably legitimate." 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990)). But these passages from *Granholm* appear in the portion of the opinion that *rejected* the States' argument "that any decision invalidating their [discriminatory state] shipment laws would call into question the constitutionality of the three-tier system." 544 U.S. at 488. In the same way, nothing in the opinions below calls into question "the constitutionality of the three-tier system," so long as the State does not structure that system in a manner that masks blatant economic protectionism.

Petitioner is asking this Court to rule that the States are free to utilize their authority under the Twenty-first Amendment to immunize state regulation of the sale and distribution of alcohol from the nondiscrimination principle of the Commerce Clause. In *Granholm*, Michigan and New York invited the same result and this Court declined the invitation in terms that are fully applicable here. In fact, in *Granholm*, the Court squarely rejected the States' argument that the Court should overrule *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), and thereby reaffirmed that a state's right to regulate alcohol is limited by the nondiscrimination principle of the Commerce Clause. 544 U.S. at 487-88. The *Granholm* Court recognized that "[a] retreat from *Bacchus* would also undermine

Brown-Forman [*Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986)], and *Healy* [v. *Beer Institute, Inc.*, 491 U.S. 324 (1989)]." The Court readily rejected the States' contentions because each of those prior cases "lend[s] significant support to the conclusion that the Twenty-first Amendment does not immunize all [liquor] laws from Commerce Clause challenge." 544 U.S. at 488.

Petitioner presents a variation on the same theme rejected in *Granholm* by claiming that the Commerce Clause should apply only to State discrimination against *producers* of alcoholic beverages or their products, leaving the States free to engage in economic protectionism with respect to the wholesale and retail tiers of the liquor industry. This more limited approach ignores the fact that the Commerce Clause, as reaffirmed in *Granholm*, has always applied to "'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.'" *Id.* at 472 (quoting *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 99 (1994)) (emphasis supplied). Petitioner ignores the holding in *Granholm* that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests*, we have generally struck down the statute without further inquiry.'" *Id.* at 487 (quoting *Brown-Forman*, *supra*, at 579) (emphasis supplied). Petitioner ignores the passage in *Granholm* expressly noting that "States may not enact laws that burden out-of-state producers *or*

shippers simply to give a competitive advantage to in-state businesses." 544 U.S. at 772 (emphasis supplied). And Petitioner disregards the fact that in reviewing the statutes in question, the *Granholm* Court observed that New York's requirement for an out-of-state winery to maintain an in-state presence in order to enjoy the benefits of direct shipment "runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963)).

In short, when fully and fairly analyzed (as in the majority opinion below), there is nothing in *Granholm* to suggest—for the alcoholic beverages industry alone—that the Commerce Clause's principle of non-discrimination applies only to producers, and does not prohibit the states from withholding licenses from prospective wholesalers or retailers for the sole reason that their owners reside in other states. *See also Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980) (invalidating a Florida law that prohibited out-of-state banks from owning or controlling in-state businesses seeking to provide investment services to Florida residents because "the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition").

The true meaning of *Granholm*, and its impact on discriminatory durational residency requirements, has not been lost on reviewing courts. In her majority opinion, Judge Moore analyzed *Granholm* closely, took into account this Court's prior decisions rejecting

Twenty-first Amendment defenses to protectionist liquor regulations, and reached the right result. *See* Pet. App. at 16a-23a. The Court's opinion was consistent with the repeated rulings of the Fifth Circuit in determining that the Texas durational residency requirements have been properly enjoined since 1991. *Id.* at 24a- 27a.

In rejecting Judge Sutton's view that the Twenty-first Amendment grants the States nearly unfettered authority over "alcohol distribution as opposed to production," the Sixth Circuit majority correctly determined that *Granholm* and the decisions that it reaffirmed establish that the nondiscrimination principle of the Commerce Clause applies both to the producers of alcoholic beverages and to those engaged in the wholesale and retail distribution of those products. *Id.* at 20a-22a, n.7. Moreover, even Judge Sutton was forced to conclude that critical aspects of Tennessee's durational residency requirements for retail licensees could not survive Commerce Clause scrutiny, even if the States were granted virtually free rein to dictate local ownership requirements for licensed package stores. *Id.* at 54a-55a. The level of discrimination against out-of-state business owners evidenced in the Tennessee durational residency requirements demonstrates the wisdom of Justice Scalia's observation in *Healy* that "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded by the Twenty-first Amendment." 491 U.S. at 344 (concurring opinion).

Because the Court of Appeals' opinion in this case is so clearly correct, and because its cogent decision should help to inter the misinterpretations of *Granholm* previously advanced by some States and repeatedly endorsed by the entrenched local retailers who seek the benefits of economic protectionism, this Court should reserve plenary review for a future case in which a reviewing court has accepted Petitioner's erroneous premise that a blatantly discriminatory durational residency requirement is somehow protected from Commerce Clause scrutiny by the Twenty-first Amendment.

CONCLUSION

For all the reasons addressed herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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